Medite of New Mexico, Inc. *and* Perry R. Salazar, Leroy Cordova, Arturo Tafoya, Max Salazar, Benny Coca, William Cordova, Karl Mueller, Pete Montano, Homer Jones, Feliverto A. Casias, Manuel Sanchez, George Montoya. Cases 28–CA–11040, 28–CA–11281–1, –2, –4, –6 through –10, –12, –13, and –19

September 15, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

On May 13, 1993, Administrative Law Judge George Christensen issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Parties filed cross-exceptions, supporting briefs, and answering briefs to the Respondent's exceptions. The Respondent also filed an answering brief to the General Counsel's and the Charging Parties' cross-exceptions and a reply to the General Counsel's and the Charging Parties' answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified below, and to adopt the recommended Order, as modified.

Introduction

The issues presented by the parties' exceptions are whether the Respondent violated Sections 8(a)(1) and (3) of the Act by (1) failing to reinstate former economic strikers or (2) failing to give them an opportunity to bid on posted vacancies, after the former strikers had tendered unconditional offers to return to work.[2] We agree with the judge's finding that the Respondent violated the Act by failing to reinstate P. Montano, K. Mueller, M. Salazar, P. Salazar, and A. Tafoya. We also agree with the judge that the Respondent did *not* violate the Act by failing to reinstate F. Casias, B. Coca, L. Cordova, W. Cordova, H. Jones, G. Montoya, and M. Sanchez because there were no vacancies in the positions that these individuals held prior to the strike, or in substantially equivalent positions.[3]

However, contrary to the judge, we find that the Respondent violated the Act by failing to allow L. Cordova, H. Jones, F. Casias, and M. Sanchez an opportunity to bid on vacancies posted by the Respondent that were open to bidding by all of its employees regardless of their current or, as in the case of the strikers, their past jobs. This finding will also extend to W. Cordova,[4] *providing* that it is determined that he did not effectively resign from the Respondent's employ, and to Coca and Montoya, *providing* that they did not engage in the alleged strike misconduct, or that, if they did, the misconduct was not serious enough to cause them to lose the Act's protection. The judge, in light of his finding that there was no merit in the opportunity-to-bid allegations, did not pass on these provisional issues. Thus, we remand to the judge to determine whether, based on untainted evidence,[5] Coca and Montoya engaged in strike misconduct and, if they did, whether they forfeited their right to reinstatement.

1. Alleged strike misconduct of P. Salazar and A. Tafoya

The Respondent has excepted to the judge's findings that the Respondent did not have a good-faith belief that P. Salazar and A. Tafoya engaged in strike misconduct that would interfere with or coerce employees in the exercise of their Section 7 rights. Although we agree that the Respondent *did* establish that it held a good-faith belief that P. Salazar and A. Tafoya engaged in strike misconduct, we find that the actual

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

[2] We agree with the judge that the claims in this case are not time-barred by Sec. 10(b) of the Act. The Respondent failed to show that the Charging Parties had clear notice, prior to July 14, 1992 (6 months before the charges were filed with the Board), that vacancies occurred in their former, or substantially equivalent, job positions. See *Great Lakes Chemical Corp.*, 298 NLRB 615 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992).

[3] For the reasons set out by the judge, we affirm his conclusions that: (1) the Respondent did not have a good-faith belief that M. Salazar's conduct was serious enough to intimidate or coerce employees in the exercise of their Sec. 7 rights; (2) the Respondent's letter dated August 21, 1991, to K. Mueller did not constitute an unconditional offer of reinstatement; and (3) the Respondent unlawfully failed to offer A. Tafoya reinstatement to the position of sander forklift operator, which is substantially equivalent to Tafoya's former position of saw forklift operator.

[4] The Respondent alleges that it was not required to reinstate W. Cordova because he tendered a written resignation to the company. The judge found it unnecessary to determine whether W. Cordova actually tendered a resignation and whether it was effective. Because we find that the Respondent violated the Act by preventing W. Cordova from bidding on posted jobs, it is necessary to determine whether W. Cordova effectively terminated his employment relationship with the Respondent. We remand this issue to the judge to make such findings. See *Augusta Bakery*, 298 NLRB 58 (1990), enfd. 957 F.2d 1467 (7th Cir. 1992).

[5] As discussed infra, we find that the judge erred in failing to sequester the General Counsel's witnesses, including the Charging Parties, during the hearing pursuant to *Unga Painting*, 237 NLRB 1306 (1978).

conduct was not serious enough to preclude P. Salazar's and Tafoya's reinstatement.

Upon unconditional offers to return to work, former economic strikers are entitled to reinstatement to their former, or substantially equivalent, positions, as the positions become vacant and available. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB v. Great Dane Trailers*, 386 U.S. 26 (1967). An employer, however, may refuse to reinstate a former striker if the employer has a good-faith belief that the former striker engaged in strike misconduct that may reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights, including their right to refrain from striking or from supporting the strikers. *Clear Pine Mouldings*, 268 NLRB 1044 (1984), affd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986). The employer's good-faith belief may be based on a CB complaint issued by the Region alleging strike misconduct. *Gem Urethane*, 284 NLRB 1349, 1353 (1987).[6] If the employer establishes that it has such a good-faith belief, then the burden shifts to the General Counsel to show that the alleged discriminatee did not, in fact, engage in the alleged misconduct or that the conduct was not serious enough to deny the discriminatee the protection of the Act. Id.

In this case, the judge found that P. Salazar and A. Tafoya, among other strikers, struck a foreman's vehicle with their cardboard picket signs while the vehicle was stopped at the picket line, but that the vehicle was not damaged during this incident. Later the same day, P. Salazar exchanged words with the owner of the vehicle, Ortiz, because Ortiz was following Salazar's car. Based on this conduct and reports of other conduct, including an incident on June 20, 1990, Region 28 issued a CB complaint alleging that the union violated Section 8(b)(1)(A) of the Act. The judge found that these were the only incidents of misconduct involving P. Salazar and A. Tafoya.[7]

After the union was decertified, the CB case settled. The settlement agreement included a nonadmissions clause. As the Board held in *Gem Urethane*, settlement of the CB case precludes its use as evidence of actual misconduct, but the Respondent can still use the issuance of the complaint in the CB case to establish its good-faith belief that misconduct occurred. 284 NLRB at 1353. The judge erred by not considering or discussing the CB case in his analysis of whether the Respondent had established its good-faith belief. We find that, based on the CB complaint, the Respondent did show that it had a good-faith belief that P. Salazar and A. Tafoya engaged in strike misconduct. This finding, however, does not end our inquiry.

Although we find that the Respondent showed that it had a good-faith belief that P. Salazar and A. Tafoya engaged in strike misconduct, we affirm the judge's ultimate conclusion that the Respondent violated the Act when it failed to reinstate these former strikers because we find that the conduct engaged in by them is insufficient to constitute misconduct which may reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights. The conduct in this case is distinguishable from the strike misconduct in *Clear Pine Mouldings* and *Gem Urethane*. In *Gem Urethane*, the strikers blocked ingress to the plant, surrounded a car, held a baseball bat in a threatening manner, pounded on cars, threatened to kill and beat up nonstriking employees, threatened to blow up the plant, threatened to burn nonstrikers' cars, and threatened to ''get'' the nonstrikers and their family members. 284 NLRB at 1353–1354. In *Clear Pine Mouldings*, the strikers carried clubs, tire irons, baseball bats, and ax handles and were accompanied by dogs. In addition, one striker swung a 2-foot long club at a nonstriking employee and struck a nonstriking employee's car. 268 NLRB at 1047–1048. In both cases, the Board found that the misconduct could reasonably tend to coerce and intimidate employees in the exercise of their Section 7 rights. 284 NLRB at 1353 and 268 NLRB at 1047.

In contrast, in this case, Ortiz briefly stopped his car at the picket line because some children were playing in the road. The judge found that P. Salazar and A. Tafoya hit the foreman's car with cardboard picket signs, but that they did not damage the car. Ortiz was able to pull away and enter the highway. We find that this brief incident does not amount to the type of serious conduct that would intimidate nonstriking employees from crossing the picket line and exercising their

[6] Chairman Gould questions the rationale of *Gem Urethane* that holds or implies that an employer's good-faith belief of a striker's misconduct may be based solely on a CB complaint issued by the Region alleging strike misconduct. He finds it unnecessary to reach that issue here, however, because it has no effect on the ultimate finding here with which he agrees.

[7] The Respondent alleges that A. Tafoya was involved in the June 20, 1990, altercation between some of the strikers and J. Mascarenas, a nonstriker. The judge found, based on credited testimony, that Tafoya was not involved in the fracas and did not hit Mascarenas. The Respondent contends that the judge erred in excluding from evidence a videotape proffered by the Respondent purporting to show that Tafoya was involved in the incident. We find that the judge properly excluded the videotape because an inadequate foundation was laid for its admission. The Respondent proffered the videotape during R. Cordova's testimony. R. Cordova was a guard at the plant and he videotaped the June 20, 1990 incident. The proffered videotape, however, was edited prior to the trial by someone other than R. Cordova, and R. Cordova was unable to testify regarding how the tape was edited. For this reason, we agree with the judge that the tape was inadmissible. Further, we find that the Respondent was not prejudiced by the exclusion of the videotape because, in the judge's discussion of the June 20, 1990, incident, the judge indicates that the film does not show that A. Tafoya hit Mascarenas. In addition, as the judge found, the Respondent's witnesses, Mascarenas and Alexander, testified that they did not see Tafoya join in the fracas and R. Cordova testified on cross-examination that he did not see Tafoya hit Mascarenas.

Section 7 rights. See *Preterm*, 273 NLRB 683, 698, 704 (1984) (adopting a judge's finding that the allegation that strikers' pounding on a nonstriker's car was insufficient to constitute serious misconduct). Cf. *Central Mack Sales*, 273 NLRB 1268 (1984) (striker engaged in serious misconduct when he intentionally beat on a nonstriking employee's car with a club, inflicting $200 in damage). In addition, P. Salazar's brief exchange of words with Ortiz later that day, which included no threats by Salazar, does not disqualify Salazar from reinstatement. *Gem Urethane*, 284 NLRB at 1354 fn. 21.[8]

2. Failure to reinstate P. Montano

The Respondent excepts to the judge's finding that the Respondent violated the Act by failing to offer P. Montano a vacancy that occurred in the cutoff saw helper position, the position that Montano held just prior to going out on strike. The Respondent argues that Montano's position was filled by R. Martinez when Montano went on strike. Martinez had been hired as a laborer, was promoted to cutoff saw helper on November 13, 1990, was demoted to laborer, and was promoted again to cutoff saw helper on September 20, 1991. Montano tendered his unconditional offer to return to work on December 4, 1990. The judge found that Montano should have been reinstated to the cutoff saw helper vacancy filled by Martinez on September 20, 1991. We agree.

The Respondent explained that because of a general reduction in force, it cut the number of cutoff saw helpers and demoted Martinez to laborer. The Respondent argues that, under *Aqua-Chem*, 288 NLRB 1108 (1988), enfd. 910 F.2d 1487 (7th Cir. 1990), cert. denied 501 U.S. 1238 (1991),[9] the General Counsel failed to satisfy its burden of proof that Martinez had no reasonable expectancy of recall. We find no merit to this argument. This case is distinguishable from *Aqua-Chem* because Martinez was not laid off from a position but was demoted from the cutoff saw helper position to the position of laborer. Further, when the September 20, 1991 vacancy occurred, Martinez was not automatically awarded the job. Instead, the Respondent posted the vacancy for bid by all of the employees. This contradicts the Respondent's contention that Martinez could reasonably expect to be returned to that position and that therefore no real vacancy existed. Consequently, this reinstatement issue is governed by the established rule that strikers who have unconditionally offered to return to work are entitled to be reinstated to their former position when a vacancy occurs. See *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

3. Discriminatory exclusion from job bidding

The judge found, and we agree, that vacancies did not occur in the jobs held prior to the strike by Casias, Coca, L. Cordova, W. Cordova, Jones, Montoya, and Sanchez, or in substantially equivalent positions. The judge also rejected the General Counsel's and Charging Parties' alternative argument that the Respondent violated the Act by denying these individuals the opportunity to bid on any job vacancies posted by the Respondent. For the following reasons, we reverse the judge's finding on this issue.

The Respondent fills job vacancies in two ways. Vacancies in certain job groups are filled by automatically promoting employees within a set progression.[10] The remaining vacancies are filled through a bid procedure in which the vacancy is posted on a bulletin board for 5 days and any full-time active employee is permitted to bid for the job. Employees are allowed to bid on, and have been awarded, less skilled and lower paying jobs. The jobs are usually awarded to the most senior applicant, although the applicant's qualifications are also considered. The successful applicant is given a 30-day trial period in the new position, and, if he is not performing satisfactorily, the Respondent will either agree to extend the trial period or will move the employee back to his former position.

The General Counsel demonstrated that the Respondent posted a number of job vacancies for bid after the above-named strikers tendered their offers to return to work. The former strikers were not informed

[8] The judge found that the Respondent did not show that it had a good-faith belief that P. Salazar engaged in serious misconduct because the only witness to testify regarding the Respondent's belief was J. Stone, who the judge found did not become the personnel director until 2 months after a vacancy opened in P. Salazar's job. Thus, the judge concluded that Stone was not in a position to know the Respondent's belief regarding Salazar at the time that a vacancy occurred in his job. The judge was mistaken as to the date that Stone became the personnel director and we thus disavow any reliance on this reasoning. However, as discussed above, we specifically find that the conduct engaged in by P. Salazar was not of such a serious nature as to coerce or intimidate employees in the exercise of their Sec. 7 rights.

[9] In *Aqua-Chem*, the Board held that in order to find that an employer violated the Act by recalling laid-off permanent replacement workers ahead of unreinstated strikers, the General Counsel must establish that a true *Laidlaw* vacancy existed by showing that, based on objective factors, the laid-off permanent workers had no reasonable expectancy of being recalled. 288 NLRB at 1110. The objective factors to consider in determining a replacement's expectancy of recall include evidence of the employer's past business experience, the employer's future plans, the length of the layoff, the circumstances of the layoff, and what the employee was told regarding the likelihood of his recall. After the General Counsel establishes a prima facie case, the burden shifts to the employer to show that, in fact, no *Laidlaw* vacancy exists or that its failure to recall the strikers was based on legitimate and substantial business justifications. Id.

[10] The job progressions are: (1) from utility to formline or press operator; (2) from sander grader to sander operator; (3) from saw helper to saw operator; (4) from tally person to loader; (5) from bander to shuffler operator; (6) from refiner helper to refiner operator; and (7) from boiler helper to boiler operator III.

of any of the job vacancies posted for bid. The General Counsel also showed that after the strike was over, and the Union was decertified, the Respondent's plant manager issued instructions to deny access to the plant premises to the former strikers.

It is well established that economic strikers who have made an unconditional offer to return to work are entitled to full reinstatement to positions left vacant by the departure of permanent replacements. *Laidlaw*, supra. The Board has subsequently made it clear that unreinstated strikers are entitled to reinstatement only to the job position that they held just prior to the strike or to a substantially equivalent position. *Rose Printing*, 304 NLRB 1076 (1991).[11] An employer is not required to reinstate former strikers to positions that they are qualified to perform if those positions are not substantially equivalent to their former jobs. Id. at 1077; *Highlands Medical Center*, 278 NLRB 1097 (1986).

In *Rose Printing*, the Board described the purpose of these rules as ensuring that ''strikers who have unconditionally offered to return to work are to be treated the same as they would have been had they not withheld their service. They are therefore entitled to return to those jobs or substantial equivalents if such positions become vacant, *and they are entitled to nondiscriminatory treatment in their applications for other jobs.*'' 304 NLRB at 1078 (emphasis added). The Board went on to note that although former strikers are not guaranteed a preference for nonequivalent jobs, employers are not free to discriminate against them, by preferring new applicants or nonstrikers, simply because they had been on strike. Id. See also *Oregon Steel Mills*, 291 NLRB 185 fn. 1 (1988), enfd. mem. No F.2d cite 134 LRRM 2432 (9th Cir. 1989), cert. denied 496 U.S. 925 (1990) (respondent unlawfully failed to offer unreinstated strikers an opportunity to bid on job vacancies until after nonstrikers and strike replacements failed to bid on the jobs).

Applying these principles to the facts in this case, it is clear that the Respondent's failure to allow the former strikers to bid on the vacancies posted for bid—a right extended to all other of its employees—constituted a form of discrimination against the former strikers. Although the former strikers were not entitled to reinstatement to the jobs they held prior to the strike because there were no vacancies, they were entitled to be free from discrimination when applying for other positions and, thus, were entitled to notice of job postings and to an opportunity to bid on, and be fairly considered for, those posted jobs. For these reasons, we find that the Respondent violated Section 8(a)(3) of the Act by preventing the Charging Parties from bidding on posted vacancies.

The Respondent contends that by accepting this theory, the Board is creating a new duty for employers, separate and distinct from the duty imposed by *Laidlaw*. We agree that the statutory obligation at issue here is different from the *Laidlaw* obligation, but we do not agree that it is new. This is not a matter of automatic reinstatement entitlement; it is a matter of being free from that discrimination in hire or tenure of employment which is expressly prohibited by Section 8(a)(3) and (1) of the Act. The Respondent surely would not argue that it would be proceeding lawfully under the Act if it announced after a strike that it was designating certain jobs as positions to which only those who had not engaged in the strike could aspire. The Respondent has engaged in analogous conduct here. By effectively prohibiting the former strikers from bidding on the posted vacancies through failing to notify them of job postings and denying them access to the plant, the Respondent discriminated against them on the basis of their former-striker status. This is discriminatory treatment that violates the Act quite apart from any *Laidlaw* obligation. *Rose Printing*, supra, 304 NLRB at 1078.[12]

4. Witness sequestration issue

The Respondent excepts to the judge's failure to sequester the General Counsel's witnesses while they were testifying about events to which others would also testify. We agree with the Respondent that, pursuant to *Unga Painting*, 237 NLRB 1306 (1978), the General Counsel's witnesses, including the Charging Parties, should have been sequestered during such testimony. For the reasons discussed below, however, we find that the Respondent was not prejudiced in the presentation of its case regarding its failure to reinstate M. Salazar, P. Salazar and A. Tafoya, so there is no reason to disturb findings concerning them. We remand to the judge for findings regarding B. Coca's and G. Montoya's involvement in strike misconduct. On remand, we direct the judge not to rely on evidence tainted by the failure to sequester the General Counsel's witnesses.

In *Unga Painting*, the Board established its limited witness exclusion rule which excludes alleged discriminatees from the portions of the hearing when another of the General Counsel's or charging party's

[11] Chairman Gould questions the holding in *Rose Printing* and is of the opinion that the Board should agree with the Supreme Court that ''[i]f and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement.'' *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1965). He finds it unnecessary to reach that issue here, however, because it has no effect on the ultimate finding with which he agrees.

[12] Because the positions put up for bid are vacant positions, a striker's successful bid for the position does not result in displacing any of the strike replacements or earlier returned strikers. Therefore, our ruling here is not inconsistent with the principles underlying *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (l938). Cf. *TWA v. Flight Attendants*, 489 U.S. 426, 433–439 (l989) (holding that an employer is not obligated to permit strikers to use their seniority to displace less senior strike ''crossovers'').

witnesses is testifying about events to which the discriminatees have, or will, or may, testify, unless the judge finds that special circumstances warrant the discriminatees' unrestricted presence or total exclusion when not testifying. 237 NLRB at 1307. Failure to sequester witnesses, or the violation of a sequestration order, may result in the tainted testimony's being stricken from the record (if a party can show that it was prejudiced by the failure to sequester), or in a stricter scrutiny of the tainted testimony.

In this case, the Respondent requested at the beginning of the hearing that the General Counsel's and Charging Parties' witnesses, including the Charging Parties themselves, be sequestered while other witnesses for those parties were testifying about common events. Without citing any special circumstances, the judge denied the Respondent's request. The Respondent contends that the judge's ruling prejudiced its presentation of its case, specifically with regard to showing that B. Coca, G. Montoya, M. Salazar, P. Salazar, and A. Tafoya engaged in strike misconduct. We find no merit to the Respondent's claim regarding M. Salazar, P. Salazar, and A. Tafoya.

M. Salazar testified only to incidents involving himself, and none of the General Counsel's other witnesses testified regarding M. Salazar's conduct; thus, the Respondent was not prejudiced by M. Salazar's presence during the hearing or by other witnesses' presence during his testimony.

The judge found that P. Salazar and A. Tafoya struck Ortiz' vehicle but, as discussed above, we found that their actions were not serious enough to bar their reinstatement. Our finding does not rest on any evidence tainted by the failure to sequester the General Counsel's witnesses. In addition, the judge's finding regarding Tafoya's role in the June 20, 1990, incident was based in part on the testimony of the *Respondent's* witnesses—not merely on the testimony of the General Counsel's witnesses. Finally, the judge found that Tafoya was not in a car with Montoya and Coca on July 11, 1990, that was allegedly involved in strike misconduct. The judge's finding is based solely on Tafoya's credibility. The judge did not rely on any of the General Counsel's other witnesses to make this finding. Because the judge's finding regarding P. Salazar's and A. Tafoya's conduct was not contradicted by, and in fact is supported by, the Respondent's witnesses, we find that the Respondent was not prejudiced by the presence of P. Salazar and A. Tafoya during the entire hearing.

Because the judge found that there were no vacancies in their positions, the judge did not determine whether the Respondent had a good-faith belief that Montoya and Coca engaged in strike misconduct or whether Montoya or Coca, in fact, engaged in strike misconduct that would interfere with or coerce employees in the exercise of their Section 7 rights. We have found, however, that the Respondent violated the Act by preventing Montoya and Coca from bidding on posted vacancies. And, as discussed with respect to P. Salazar and A. Tafoya, we find that the Respondent established that it had a good-faith belief that Montoya and Coca engaged in strike misconduct as alleged in the CB complaint. We therefore remand Cases 28–CA–11281–6 and 28–CA–11281–19 to the judge to determine (1) whether the record shows that Coca and Montoya did not engage in the alleged strike misconduct and (2) if they did engage in the misconduct, whether the misconduct was serious enough to remove them from the protection of the Act. In remanding these issues, we direct the judge to rely only on evidence that was not tainted by the presence of the General Counsel's and the Charging Parties' witnesses during testimony of common events.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 2.

''2. Since December 1990, James D. Stone has been Medite's personnel director, a supervisor and agent of Medite acting on its behalf within the meaning of Section 2 of the Act.''

2. Insert the following for Conclusion of Law 5 and reletter the existing Conclusion of Law 5 as Conclusion of Law 6.

''5. By failing and refusing to offer L. Cordova, H. Jones, F. Casias, and M. Sanchez the opportunity to bid on job vacancies, without establishing any legitimate business justification, the Respondent violated Section 8(a)(3) and (1) of the Act.''

AMENDED REMEDY

Having found that the Respondent, Medite of New Mexico, Inc., has engaged in certain unfair labor practices, we shall order it to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall be ordered to immediately recall Pete Montano, Karl Mueller, Max Salazar, Perry Salazar, and Arturo Tafoya to the positions they occupied at the time they went on strike, or to substantially equivalent positions, with full seniority and all other rights and privileges, and to make Montano, Mueller, M. Salazar, P. Salazar, and Tafoya whole for the discrimination practiced against them by payment to each of the sum of money equal to what each would have earned from the date that each should have been recalled until the date each is recalled, less interim earnings during the period, computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest on the sum due to each computed in accordance with the formula in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent shall also be ordered to offer reinstatement to L. Cordova, H. Jones, F. Casias, and M. Sanchez if, at the compliance stage of this proceeding, these former strikers are determined to have been denied reinstatement as a consequence of the Respondent's failure to give them an opportunity to bid on job vacancies, and the Respondent shall make them whole for any loss of pay and benefits they may have suffered by reason of the Respondent's discrimination against them, such payment to be made in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[13]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Medite of New Mexico, Inc., Las Vegas, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b) and reletter the subsequent paragraph.

''(b) Refusing to offer to qualified unreinstated strikers the opportunity to bid on job vacancies.''

2. Substitute the following for paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Offer reinstatement and backpay to L. Cordova, H. Jones, F. Casias, and M. Sanchez, if at the compliance stage of this proceeding, those individuals are determined to have been denied reinstatement as a consequence of the Respondent's failure to offer them an opportunity to bid on job vacancies in the manner set forth in the remedy section of this decision.''

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that Cases 28–CA–11281–6, 28–CA–11281–7, and 28–CA–11281–19 are severed from the above-captioned proceeding and are remanded to Administrative Law Judge George Christensen for the limited purpose of determining (1) whether W. Cordova effectively terminated his employment relationship with the Respondent; and (2) whether the record shows that B. Coca and G. Montoya did not engage in the alleged strike misconduct or, if they did engage in the misconduct, whether the misconduct was serious enough to coerce or intimidate employees in the exercise of their Section 7 rights. In making these latter determinations, we direct the judge to rely only on evidence and testimony that is untainted by the failure to sequester witnesses during testimony regarding common events.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a Supplemental Decision setting forth the above determinations in Cases 28–CA–11281–6, 28–CA–11281–7, and 28–CA– 11281–19 including credibility resolutions, findings of fact, conclusions of law, and a recommended order. Copies of such Supplemental Decision shall be served on all the parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

[13] The same remedy will apply to Montoya and Coca if it is found, on and after remand, that they did not lose the protection of the Act, and to W. Cordova if it is found that he did not effectively terminate his employment relationship with the Respondent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to recall our former striking employees to positions they occupied at the time they went out on strike or to substantially equivalent positions when vacancies in those positions occur and following their tender to us of an unconditional offer to return to work.

WE WILL NOT refuse to offer to qualified unreinstated strikers the opportunity to bid on job vacancies in preference to nonstrikers and strike replacements on the payroll.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 7 of the Act.

WE WILL recall Pete Montano, Karl Mueller, Max Salazar, Perry Salazar, and Arturo Tafoya to the positions they held when they went out on strike on June 11, 1990, or to substantially equivalent positions.

WE WILL make Pete Montano, Karl Mueller, Max Salazar, Perry Salazar, and Arturo Tafoya whole for any wage or benefit losses they suffered by virtue of our unlawful discrimination against them, restore them to full seniority and all other rights, privileges and benefits to them, and pay interest on the sums due to each of them.

WE WILL offer reinstatement and backpay, with interest, to L. Cordova, H. Jones, F. Casias, and M. Sanchez, if it is determined that they were unlawfully denied reinstatement as a consequence of our failure to offer them an opportunity to bid on job vacancies because we preferred nonstrikers and strike replacements then on the payroll.

MEDITE OF NEW MEXICO, INC.

Lewis Harris, for the General Counsel.
Craig Fretwell (Northern New Mexico Legal Services), of Las Vegas, New Mexico, for Perry R. Salazar et al.
Nicholas J. Noeding & Margaret R. McNett (Hinkle, Cox, Eaton, Coffield & Hensley), of Albuquerque, New Mexico, for Medite.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. During a 1990 strike called by the Western Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Union), Medite of New Mexico, Inc. (Medite) replaced all of the striking employees. The Union was subsequently (in October 1990) decertified as the collective-bargaining representative of Medite's production and maintenance employees. Following the decertification, strikers began tendering offers to return to work.

On August 13, 1991, ex-striker Perry Salazar (P. Salazar) filed a charge with Region 28 of the National Labor Relations Board (the Board) alleging Medite violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by failing to reinstate him (Case 28–CA–11040). In October 1991, ex-striker Paul Garcia filed a charge alleging Medite violated the Act by refusing him entry to the plant premises (Case 28–CA–11159) while in the employ of BTU Concrete, Inc. (BTU) delivering BTU products to Medite, causing his discharge by BTU. On January 14, 1992, Garcia filed another charge alleging Medite violated the Act by failing to reinstate him (Case 28–CA–11281–15). On the latter date, ex-strikers Leroy Cordova (L. Cordova), Arturo Tafoya, Max Salazar (M. Salazar), Benny Coca, William Cordova (W. Cordova), Karl Mueller, Pete Montano, Homer Jones, Feliverto Casias, Manual Sanchez, and George Montoya filed similar charges (Cases 28–CA–11281–1, 2, 4, 6—8, 10, 12, 13, and 19).

On February 28, 1992, the Regional Director for Region 28 consolidated Cases 28–CA 11281–1, 2, 4, 6, 7, 9, 10, 12, 13, 15, and 19, issued a consolidated complaint encompassing those charges, and set the hearing on the issues raised by the complaint for June 2, 1992.

On March 12, 1992, the Regional Director consolidated Cases 28–CA–11040 and 28–CA–11159 with the other cases listed above and rescheduled the hearing to May 5, 1992.

I conducted a hearing on the issues raised in the above-listed cases on May 5, 6, 7, and 8, 1992, at Las Vegas, New Mexico.

During the hearing, the parties reached a settlement of the issues raised by Cases 28–CA–11159 and 28–CA–11281–15, which I approved.

Subsequent to the hearing, Counsel Harris moved to reopen the record, consolidate a complaint issued in Case 28–CA–11515 with the other cases set out above, and to set a hearing date therefor. I granted the motion and the reopened hearing was set to resume on November 5, 1991. On the day before the date the hearing was to resume, the parties reached a settlement of the issues raised by Case 28–CA–11515, which I approved.

The consolidated complaint alleges Casias et al. unconditionally offered to return to work following the October 1990 decertification of the Union; Medite hired new employees for, and transferred employees to, positions which should have been offered to Casias et al., following its receipt of those offers without offering Casias et al., reinstatement to those positions; and that Medite thereby violated Section 8(a)(1) and (3) of the Act.

Medite in its answer to the consolidated complaint denied Casias et al. unconditionally offered to return to work; denied subsequent to its receipt of offers to return to work by Casias et al. it hired new employees and transferred employees to jobs which it should have offered to Casias et al.; denied it failed to offer Casias et al. reinstatement to such jobs; denied it violated the Act; and affirmatively alleged Medite was entitled to bar the reinstatement of Coca, Montoya, and the two Salazars because Medite had an honest belief the four engaged in strike misconduct and engaged in strike misconduct; further alleged other Charging Parties secured employment at substantially equivalent jobs and abandoned their right to reinstatement; and lastly alleged the Charging Parties are not entitled to any relief because their charges were untimely filed.

Medite subsequently took the position it was entitled to bar the reinstatement of Coca and Mueller because they never offered to return to work; that it was entitled to bar the reinstatement of Tafoya because it had an honest belief Tafoya engaged in strike misconduct; and that it was entitled to bar the reinstatement of W. Cordova because he submitted a written resignation of his employment.

The issues created by the foregoing are whether:

1. The Charging Parties are barred from any relief under Section 10 (b) of the Act.
2. The 12 unconditionally offered to return to work.
3. Medite failed to offer reinstatement to any of the 12.
4. Medite hired new employees or transferred employees to jobs which it should have offered the 12 following its receipt of unconditional offers from the 12 to return to work.
5. Medite violated the Act.
6. Presuming Medite violated the Act by failing or refusing to reinstate Coca, Montoya, the two Salazars and Tafoya, was Medite entitled to deny Coca, Montoya, the two Salazars, and Tafoya reinstatement because it held an honest belief they engaged in misconduct during the strike.
7. Presuming Medite violated the Act by failing or refusing to reinstate Coca and Mueller, was Medite entitled to deny Coca and Mueller reinstatement because they failed to unconditionally apply for reinstatement.
8. Presuming Medite violated the Act by failing or refusing to reinstate the Charging Parties, was Medite entitled to deny such reinstatement because one or more of the Charging Parties acquired substantially equivalent employment to jobs they held at Medite prior to striking and abandoned seeking reinstatement;.
9. Presuming Medite violated the Act by failing or refusing to offer reinstatement to W. Cordova, was Medite entitled to deny W. Cordova reinstatement because he submitted a written resignation of his employment to Medite.

Counsel were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. All three filed briefs.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs and research, I enter the following

FINDINGS OF FACT[1]

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer admitted, and I find at all pertinent times Medite was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary*

Medite and its predecessor, Montano de Fibre, have operated a plant at Las Vegas, New Mexico, for some time, employing a work force of a little over 100 employees to create fibreboard panels, cutting the panels to sizes specified by its customers, sanding the panels, and binding, packing, and shipping the final products.

In 1990, Medite utilized the following job classifications in identifying the jobs performed by its work force at the plant: PRODUCTION: laborer, refiner/boiler helper, utility, press operator, forming operator, refiner operator, dozer operator and storage operator; FINISH END: laborer, sticker, saw forklift operator, saw helper, saw operator, bander, shuffler operator, sander forklift operator, sander grader and sander operator; SHIPPING: stager, tally person, loader and loader leadman; MAINTENANCE: millwright apprentice, millwright journeyman, millwright/machinist, millwright leadman, oiler, mechanic, electrician apprentice and electrician/journeyman; BOILER: boiler helper, boiler operator III, II and I; ENVIRONMENTAL: laborer and truckdriver.

The Union was certified as the collective-bargaining representative of Medite's production and maintenance employees at the plant in mid-1989 and, unsuccessful in its efforts to negotiate a contract covering the wages etc. of those employees, called the employees out on strike in support of its contract proposals in June 1990. About 60 employees responded to the strike call, including Casias, Coca, L. Cordova, W. Cordova, Garcia, Jones, Montano, Montoya, Mueller, Pereara, Sanchez, M. Salazar, P. Salazar, and Tafoya.

The strike ended with the October 1990 union decertification.

B. *The Jobs Held by Casias et al. Prior to the Strike*

Prior to the strike Casias et al. worked in the following successive job classifications:[2]

l. Casias—oiler
2. Coca— welder, log loader, laborer, storage operator, millwright
3. L. Cordova—millwright
4. W. Cordova—cleaner operator, rip chain, laborer, utility trainee, saw forklift operator, bander, shuffler operator
5. Jones—environmental (outside laborer), saw helper, bander, sander grander, sander operator
6. Montano—environmental (outside laborer), laborer, saw helper
7. Montoya—welder, millwright
8. Mueller—sticker, laborer
9. Sanchez—welder, utility, laborer, environmental (outside laborer), saw forklift operator, truckdriver, millwright 3, millwright leadman, millwright
10. M. Salazar—barker/saw operator, loader, laborer, bander
11. P. Salazar—laborer, refiner helper, inline saw operator, utility
12. Tafoya—laborer, saw forklift operator

C. *The Offers to Return to Work*

Casias sent the following letter to Medite on November 14, 1990:

> Now that the Union has been decertified and the strike is over I am writing to request that I be reinstated in my job.
>
> Your prompt response will be appreciated.

An identical letter was sent to Medite by Coca, L. Cordova, W. Cordova, M. Salazar, P. Salazar, and Tafoya on the date Casias sent his letter.

Sanchez applied orally for reinstatement in mid-November 1990, by a telephone call to Medite's personnel director, James D. Stone.

On December 3, 1990, Jones sent a letter identical to the Casias letter to Medite.

Identical communications were dispatched by Montano on December 4, 1990, and by Montoya on December 19, 1990.

Mueller did not make a formal request for reinstatement until September 17, 1991 (the circumstances prompting the request are detailed below).

D. *Medite's Responses to Casias et al.*

On November 19, 1990, Medite's plant manager, Michael L. Miller, sent the following response to Casias' November 14, 1990 letter:

[1] Although every apparent or nonapparent conflict in the evidence has not been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying and my evaluation of the reliability of their testimony; therefore any testimony which is inconsistent with my findings is hereby discredited.

[2] Some of the earlier jobs listed were performed at the sawmill, prior to a transfer to the plant. Medite's predecessor ceased to operate the sawmill about 7 years prior to the hearing.

> As you probably know, after you went on ''strike'' a replacement was hired to fill your position. Therefore, we are unable to return you to work.

In Sanchez' mid-November 1990 conversation with Stone, Stone informed him there were no openings; and on November 19, 1990, Miller sent Sanchez a letter identical to his response to Casias' reinstatement request.

Miller sent a response identical to his response to Casias' reinstatement request to Coca, L. Cordova, W. Cordova, Jones, Montano, Montoya, M. Salazar, P. Salazar, and Tafoya shortly after his receipt of their requests.

E. *Medite Policies Vis-a-Vis Ex-Strikers*

Following the October 1990 union decertification, Plant Manager Miller issued instructions to bar any access to the plant premises by the ex-strikers (other than escorted access to pick up personal items).

His instructions were followed, resulting in the Garcia charge and complaint in Case 28–CA–11159 against BTU and Medite alleging BTU discharged Garcia, who was employed as a truckdriver, because Medite refused to permit Garcia to enter Medite's plant premises to deliver BTU material and as evidenced by Stone's interviewing P. Salazar at the guard shack outside the plant premises rather that at his office in the plant to discuss P. Salazar's reinstatement (detailed below).

Medite did not prepare any preferential hiring list following the end of the strike, only notifying its foremen of the presence of the ex-striker's personnel files at the personnel office for their reference if they so chose when they needed replacements in their respective departments.[3]

F. *The Alleged Reinstatement Offers*

Medite has not offered reinstatement to Casias, Coca, L. Cordova, W. Cordova, Jones, Montano, Sanchez, M. Salazar, and Tafoya at any time since Medite's receipt of their offers to return to work.

On July 30, 1991, Medite wrote to P. Salazar, stating:

> A Utility position has now become available at Medite of New Mexico.
>
> If you are interested in returning to your former position here, you will need to respond to us by Monday, August 5, 1991. If we do not hear from you by that date, we will assume you are no longer interested in working for our Company.

P. Salazar called the plant on August 2, 1991, expressed his desire to return to work and was requested to appear at the plant and ask for Personnel Director Stone on his arrival. He went to the plant and was met outside the plant on August 5, 1991, by Stone, who told him the July 30, 1991 communication was a mistake, charges had been filed alleging misconduct by P. Salazar during the strike and Medite had decided not to recall him.

Although Mueller did not file any request for reinstatement with Medite, on August 21, 1991, Medite wrote to Mueller, stating:

> A job opening exists at the plant in the Laborer position classification. There are several eligible persons who may be eligible to fill this job. If you are interested in filling this position, please contact the undersigned (Personnel Manager Stone) on or before 4:00 PM on Tuesday, August 27, l99l.
>
> If you do not contact us by this date, the Company will assume that you are not interested in reinstatement, and the position will be offered to another person.

Mueller signed a receipt acknowledging his receipt of the August 21, 1991 letter on August 23, 1991. He did not contact Stone until September 3, 1991, at which time he telephoned Stone and stated he was interested in returning to work. Stone replied since Mueller did not contact him prior to the date indicated in the letter, August 27, 1991, Medite had given the job to another qualified person who expressed interest in it, therefore the job was no longer available.

On September 17, 1991, Mueller wrote to Stone to advise Stone he wanted to return to work at Medite and requested he be offered any future openings.

Neither Mueller nor P. Salazar was ever contacted by Medite and offered employment subsequent to the exchanges just described.

G. *New Hires and Employee Transfers Following the End of the Strike*

On November 7, 1990, Medite hired Tracy Skaggs, Andrew Espinoza, and Randy Maestas as laborers; on November 20, 1990, Medite hired Martin Gonzales as a laborer; on November 26, 1990, Medite hired Joseph Thrush, Benny Armijo, and Curtis Garcia as laborers; on January 7, 1991, Medite hired Charlie Vigil as a laborer; on January 10, 1991, Medite hired Clarence Romo and Clarence Romero as laborers; on May 6, 1991, Medite hired Josephine Roybal as a laborer; on September 10, 1991, Medite hired Amos Romero as a laborer; on September 11, 1991, Medite hired Frank Carrillo and Carmen Lopez as laborers; on November 8, 1991, Medite hired Danny Saiz as a laborer; on December 9, 1991, Medite hired Mike Salazar and Leonard Romero as laborers; on February 25, 1992, Medite hired Andrie Lucero as a laborer; on March 27, 1992, Medite hired John Parson as a laborer; and on April 15, 1992, Medite hired Olmedo Griego as a laborer.

Subsequent to the hirings just detailed, Skaggs was transferred to a sticker position, at a higher rate of pay; Espinoza was transferred to positions as saw helper and bander, at a higher rate of pay; Maestas was transferred to the position of sticker at a higher rate of pay; Thrush was transferred to the utility position at a higher rate of pay; Armijo was transferred to a position as saw helper at the same rate of pay; Romero was transferred to positions as sticker and sander grader at higher rates of pay; and Carrillo was transferred to a position as sticker at a higher rate of pay.

On November 5, 1990, Johnny Martinez, hired on June 21, 1990, as a laborer, was transferred to a truckdriver position at a higher rate of pay; on November 18, 1990, Richard Martinez, hired on July 31, 1990 as a laborer, was transferred to a saw helper position at a higher rate of pay; on December 18, 1990, Richard Duran, hired on June 21, 1990, as a laborer, was transferred to a utility position at a higher rate of pay; on March 12, 1991, Benito Jaramillo, hired on August

[3] It was normal practice for the foremen to interview and decide who to hire when replacements were needed.

1, 1990, as a laborer, was transferred to a refiner helper position at a higher rate of pay; on March 21, 1991, Michael Hayes, hired on November 8, 1989, and on March 16, 1990, working as a refiner helper, was transferred to a saw operator position at a higher rate of pay; on March 21, 1991, Edward Gallegos, hired on August 1, 1990, as a laborer, was transferred to a bander position at a higher rate of pay; on June 12, 1991, William Pena, hired on September 20, 1988, and on June 6, 1991, working as a storage operator, was transferred to a sander forklift operator position and on the same date Edward Gallegos, hired on December 7, 1988, and working as a laborer on June 6, 1991, was transferred to the storage operator position vacated by Pena; on July 1, 1991, John Montoya, hired June 25, 1990, as a laborer, was transferred to a bander position at a higher rate of pay; on August 5, 1991, Ignacio Gonzales, hired July 2, 1990, as a laborer, was transferred to a utility position at a higher rate of pay; on August 21, 1990, Kevin Trujillo, hired as a laborer on June 29, 1990, was transferred to a utility position at a higher rate of pay; on August 27, 1991, Frank Valdez, whose hiring date and classification does not appear in the record, was transferred to a saw operator position, presumably at a higher rate of pay; on September 4, 1991, Andy Valdez, hired on October 4, 1990, as a laborer and transferred on April 2, 1991, to the higher paying position of sticker, was again transferred to a bander position at a higher rate of pay.

Subsequent to November 1, 1990, other persons hired during the 1990 strike and one hired in January 1991 were transferred to tally person and sticker positions. The transfers listed above were accomplished through a bid process, with seniority as the major and usual determining factor.[4]

An undetermined number of automatic transfers were undoubtedly effected within certain job groups as vacancies developed therein subsequent to the end of the strike, since Medite followed a policy of automatically promoting employees up what was designated a progression ladder within the following categories: (1) from utility to formline or press operator; (2) from sander grader to sander operator; (3) from saw helper to saw operator; (4) from tally person to loader; (5) from bander to shuffler operator; (6) from refiner helper to refiner operator; and (7) from boiler helper to boiler operator III. For example, Mark Dominguez, hired as a laborer during the strike, was progressed to sander grader 1 month after his hire and to sander operator 1 month later.

H. *Qualifications of Casias et al. for Jobs Available After the Strike Ended*

Prior to the strike, W. Cordova, Jones, and M. Salazar worked as banders; W. Cordova, Sanchez, and Tafoya worked as saw forklift operators; Montano and Jones worked as saw helpers; Montano, Jones, and Sanchez worked as environment employees (outside laborers); P. Salazar worked as a saw operator; W. Cordova, Montano, Mueller, M. Salazar, P. Salazar, and Tafoya worked as laborers; Coca, L. Cordova, Montoya, and Sanchez worked as millwrights; Casias worked as an oiler; P. Salazar worked as a utility employee; P. Salazar worked as a refiner helper; Jones worked as a sander operator and as a sander grader; Sanchez worked as a sander forklift operator; W. Cordova worked as a shuffler operator; Sanchez worked as a truckdriver; and Coca worked as a storage operator.

Gallegos, hired on August 1, 1990, as a laborer; John Montoya, hired on June 25, 1990, as a laborer; Valdez, hired on October 4, 1990, as a laborer; and Espinoza, hired on November 7, 1990, as a laborer, were transferred to bander positions on March 16, 1991, June 25, 1991, August 27, 1991, and November 5, 1991, respectively.

W. Cordova worked as a bander beginning in July 1989; Jones worked as a bander beginning in September 1988; and M. Salazar worked as a bander beginning in August 1986. All three had earlier plant seniority dates. W. Cordova was working as a bander at the time he went on strike; the other two transferred to other jobs after working as banders. Medite has not offered reinstatement to any of the three at any time since its receipt of their requests for reinstatement.

Richard Martinez, hired on July 31, 1990, as a laborer, was transferred to a saw helper position on November 13, 1990, and reassigned to that position on September 20, 1991.

Jones worked as a saw helper beginning in April 1988 and Montano worked in that classification beginning in May 1990.

Both had earlier plant seniority dates. Montano was working as a saw helper at the time he went on strike; Jones transferred to another job after working as a saw helper. Medite has not offered reinstatement either to Jones or Montano since its receipt of their requests for reinstatement.

Twenty employees were hired between November 7, 1990, and May 15, 1992, as laborers.

W. Cordova, Jones, Montano, Mueller, P. Salazar, M. Salazar, and Sanchez all worked in that classification beginning on various dates in 1984, 1985, 1987, 1988, 1989, and 1990. Mueller was working as a laborer at the time he went on strike. Since his September 17, 1991, request for reinstatement, Mueller has not been offered reinstatement by Medite; nor have the others named have been offered reinstatement by Medite since receiving their requests therefor.

Richard Duran, hired on June 21, 1990, as a laborer, was transferred to a utility position on December 11, 1990; Ignacio Gonzales, hired on July 2, 1990, as a laborer, was transferred to a utility position on July 31, 1991; Kevin Trujillo, hired on June 29, 1990, as a laborer, was transferred to a utility position on August 16, 1991; and Joseph Thrush, hired on December 26, 1990, as a laborer, was transferred to a utility position on December 18, 1991.

P. Salazar commenced work in the utility position in December 1989 and held that position at the time he went on strike. He was hired in October 1987. Medite has not offered reinstatement to P. Salazar since receiving his request therefor.

Benito Jaramillo, hired on August 1, 1990, as a laborer, was transferred to a refiner helper position on March 7, 1991. Joseph Garcia, hired on August 21, 1990, as a laborer, was transferred to a refiner helper position on June 12, 1991.

P. Salazar commenced work in the refiner helper position in April 1988, prior to his 1989 transfer to a utility position. Medite has not offered P. Salazar reinstatement to any position since receiving his request therefor.

[4] Personnel Director Stone so testified. He also testified employees were permitted to and did bid for less skilled and lower paying positions than the positions they currently held and evidence was developed employees did bid for and were awarded positions in less skilled and lower paying levels than the positions they held at the time they bid.

William Pena, hired during the strike as a laborer, was transferred to the position of sander forklift operator on June 6, 1991; Ray Lucero, hired on June 22, 1990, as a laborer, was transferred to the position of sander forklift operator on April 1, 1992.

Sanchez commenced work as a sander forklift operator in November 1984. He has not been offered reinstatement to any position since filing his reinstatement request with Medite.

Amos Romero, hired on September 10, 1991, as a laborer and subsequently transferred to the position of sticker on December 9, 1991, was transferred to the position of sander grader on April 14, 1992.

Jones commenced work as a sander grader in August 1989. His plant seniority date predated that assignment. Medite has not offered Jones reinstatement to any position since he filed his reinstatement request with Medite.

Edward Gallegos, hired on December 7, 1988, as a laborer, was transferred to the position of storage operator on June 6, 1991.

Coca commenced work as a storage operator in October 1985 and began work at the plant in September of that year.[5]

Medite has not offered Coca reinstatement to any position since receiving his reinstatement request.

Since Medite's receipt of reinstatement requests from Casias et al., the record fails to reflect the occurrence of any vacancies in the positions of: saw forklift operator; millwright; oiler; sander operator; and shuffler operator.[6]

I. *The Alleged Strike Misconduct*

1. Preliminary

The plant was operated around the clock, requiring the scheduling of three shifts.

The strikers began to man picket lines outside the plant on June 11, 1990, and continued to picket until the Union was decertified in October 1990.

There were railroad tracks alongside the highway employees traveled on in their vehicles prior to turning onto a driveway which crossed the railroad tracks and led to a parking lot outside the plant. On leaving the plant in their autos and proceeding across the railroad tracks to the highway, the employees encountered a stop sign at the highway, entered the highway and turned either right or left.

The strikers and their supporters parked their vehicles on both sides of the highway near the driveway and picketed at the point the highway and the driveway intersected. They also carried picket signs on both sides of the highway opposite the driveway entrance. After a time, at the request of police, the strikers and their supporters parked their vehicles only on the side of the highway opposite the driveway entrance. The families of the strikers were often present at the picket line. The strikers and their families prepared and consumed food and drink in the vicinity of their vehicles. At night, the strikers chopped wood and maintained a fire within a barrel near the picket line.

2. Alleged June 13, 1990 Misconduct (P. Salazar and Tafoya)

At approximately 3:30 p.m. on June 13, 1990, Foreman Tommy Ortiz left the parking area outside the plant, drove his jeep across the railroad tracks, and came to a stop short of the highway because several children were playing in the driveway.

Several pickets gathered around his vehicle, including P. Salazar and Tafoya (on the driver side of the vehicle). The pickets called him a scab, struck his vehicle with the picket signs they were carrying, and Tafoya asked Ortiz to leave his vehicle.[7] Ortiz made no response and slowly proceeded to and turned onto the highway.

Ortiz claimed he later discovered 8 to 10 deep scratches on the vehicle, reported the incident to Plant Manager Miller (by telephone) and drove to a police station to report the incident.[8]

After leaving the police station, Ortiz saw P. Salazar drive by in his vehicle (the pickets were picketing on 4-hour shifts and Salazar's shift ended at 4 p.m.). Ortiz began to follow Salazar. When Salazar noticed the jeep following him through several turns, he pulled to the side of the road to see if the jeep would pass. Ortiz did not pass, but pulled up behind Salazar's vehicle. Salazar left his vehicle and asked Ortiz why he was following him. Ortiz accused Salazar of being responsible for damage to his jeep. Salazar denied the charge. Ortiz insisted Salazar was responsible and said he and his brothers would get him later. Salazar replied why wait, I'm here now. Ortiz drove away without responding.

On June 28, 1990, Ortiz executed an affidavit describing the picket line incident. He did not mention the later encounter with Salazar in the affidavit. Medite utilized the affidavit in seeking and securing an injunction order from a state court.

---

[5] Seniority dates from the date of employment at the plant (per Stone's testimony). Prior employment at the sawmill is not credited.

[6] The record establishes a practice whereby employees were automatically transferred into sander operator and shuffler operator positions but failed to develop whether employees with less seniority than W. Cordova and Jones were placed in those positions automatically subsequent to Medite's receipt of their offers to return to work.

[7] The picket signs were made from cardboard, utilizing cardboard boxes secured from local grocery stores. The cardboard signs were affixed with staples or tape to 1/4 x 1-1/2 inch fibreboard sticks.

[8] Although I credit Ortiz' testimony he saw P. Salazar and Tafoya among the pickets surrounding his vehicle on the driver's side and his testimony the two, among others, struck his vehicle with the picket signs they carried, I do not find that testimony establishes either that Salazar or Tafoya inflicted the alleged scratches in view of the composition of the signs, Ortiz' statement (in one of his affidavits) scratches were inflicted on another of his vehicles while it was parked outside his home and Ortiz' failure to identify *where* the alleged scratches were located (in view of his placement of Salazar and Tafoya on the driver side of his vehicle and Salazar's testimony, which I credit, he did not see any scratches on Ortiz' vehicle when he approached the Ortiz vehicle, in the encounter following the picket line incident). Also, while I credit Ortiz' testimony there were scratches on both of Ortiz' vehicles, since Ortiz did not testify he saw *Salazar and Tafoya* inflict the scratches nor knew were the scratches were located, I find the record fails to establish Salazar and Tafoya or any other picket inflicted the scratches during the picket line encounter.

On July 11, 1990, Ortiz executed a statement before an agent of Region 28 again describing the picket line incident and making no mention of the later encounter with Salazar.[9]

3. Alleged June 20, 1990 misconduct (Coca, Montoya, and Tafoya)

On June 20, 1990, Maintenance Superintendent Joe Alexander and electrician Joseph Mascarenas worked overtime, leaving the plant about 7:30 p.m. Alexander and Mascarenas left the parking area in separate vehicles, Mascarenas leading. After Mascarenas left the driveway and turned onto the highway, with Alexander behind him, strikers lining both sides of the highway who were milling about engaged in their customary practice of shouting scab and other derogatory comments at the occupants of the vehicles. Mascarenas, a 6-footer, responded by alighting from his vehicle (he was driving, with his brother as a passenger) and came face-to-face with Coca. Another striker, Michael Leyba, was alongside Mascarenas. Coca said bring it on (epithet) and Mascarenas struck Coca, knocking him down, with Coca, a much smaller man, kicking Mascarenas on his way down. About the same time, Leyba struck Mascarenas from the side, injuring his eye. Other strikers mixed in, striking Mascarenas, including Montoya. Alexander hurried forward when he saw what was happening; he and some of the strikers separated the combatants and escorted Mascarenas back to his vehicle, exhorting Mascarenas to leave the area, which he did, Alexander following. At the time Mascarenas left his vehicle and the strikers gathered around him, Tafoya was on the opposite side of the street grilling hamburgers and hotdogs in front of a parked vehicle. He reached a point behind Coca as blows were exchanged and told the strikers to cut it out, they didn't need this.[10]

Mascarenas initially testified ''everybody'' had beers but later modified his testimony to state Coca and Leyba had beers in their hands, which they threw away, and that he saw two coolers alongside the road, though conceding he did not know what they contained.[11]

The following day (June 21, 1990), as Mascarenas left the plant in the same vehicle (with someone else driving), the vehicle again stopped as it proceeded down the highway after leaving the plant driveway and Mascarenas again began to leave the vehicle as the pickets yelled scab and other epithets. A policeman at the scene, however, ordered Mascarenas to stay in his vehicle and proceed. The vehicle then proceeded down the highway.

Mascarenas and Alexander furnished affidavits to Medite on June 28, 1990, reciting their versions of what transpired on June 20, 1990. The affidavits were utilized by Medite to secure a state court injunction. On July 11, 1990, Mascarenas gave a statement to an agent of Region 28 in the course of the Region's investigation of Medite's June 20, 1990 charge discussed above.

4. Alleged July 10, 1990 misconduct (Montoya)

Mark Dominguez was hired by Medite as a laborer during the strike. On July 10, 1990, he was assigned to the night shift and about 11:30 p.m. was approaching the plant driveway in his auto. He saw Montoya on the side of the highway near the driveway as he slowed to turn into the driveway, carrying an ax. As he approached the place Montoya was standing, Montoya swung the ax up and stated ''I'll kill you'' while stepping onto the highway. Dominguez swerved his vehicle to the left, avoiding Montoya, turned onto the driveway and entered the plant parking area.

On July 11, 1990, Dominguez gave a written statement to an agent of Region 28 relating the ax incident during Region 28's investigation of Medite's June 20, 1990 charge described heretofore.

5. Alleged July 11, 1990 misconduct (Montoya, Coca, and Tafoya)

The next day Dominguez was driving his auto down Grand Avenue in Las Vegas. An auto driven by Montoya pulled up alongside his auto. Coca occupied the passenger seat.[12] The two called Dominguez a scab. Montoya told Dominguez to pull over and said we will get you later when Dominguez drove on.

6. Alleged July 11, 1990 misconduct (Montoya and Coca)

Shipping foreman Mike Griego's wife came to the plant on or about July 11, 1990, to pick up Griego. Griego took the wheel and left the plant premises. An auto driven by Montoya, with Coca in the passenger seat, drove alongside his car on the left. Both Griego's and Coca's car windows were rolled down. Coca had a video camera in his possession.[13] Coca called Griego a scab and addressed several epithets towards him. Montoya did not speak. Griego told his wife to ignore the two, to turn on the radio. The two autos then went their separate ways.

7. Alleged M. Salazar misconduct during the strike

Margaret Espinosa was a longtime employee of Medite. She cleaned Medite's offices, worked a 4 p.m. to midnight shift and worked that shift throughout the strike period (June to October 1990). On approximately five occasions, when she entered the plant driveway in her auto prior to starting work, M. Salazar was manning the picket line and shouted obscenities at her. She reported to Miller that M. Salazar shouted ''bad words'' to her on the five occasions but did not recite what M. Salazar said to her.

Approximately a week before the hearing in this case, Espinosa learned the hearing had been scheduled, contacted Stone, and volunteered to testify against M. Salazar. Stone

[9] On June 21, 1990, Medite filed a charge in Case 28–CB–3311 alleging, inter alia, by the alleged conduct of Tafoya and Salazar at the picket line the union violated Sec. 8(b)(1)(A) of the Act, making no mention of the later Salazar encounter. The statement was secured during the Region's investigation of the charge. A complaint based on the charge issued on August 6, 1990. Following the Union's October 1990 decertification, a settlement was reached which, inter alia, contained a nonadmission provision.

[10] Tafoya was a strike leader. He testified he did not strike Mascarenas and Mascarenas confirmed his testimony.

[11] L. Cordova's testimony the coolers contained cokes for the children present was uncontradicted and is credited.

[12] Dominguez claimed Tafoya was also in the vehicle. Tafoya denied he was in the auto. I credit the denial; Tafoya was a convincing witness.

[13] Coca denied he had a video camera. In any event, Griego did not testify Coca made any use of the camera.

testified Miller informed him of the five Espinosa reports after each report was made but that he was unaware of whether any written record of the reports was made[14] and that no written statement from Espinosa was sought and secured until she volunteered to testify.

Her oral reports to Miller were not utilized to support either Medite's injunction action or Medite's unfair labor practice charges versus the Union.

Shipping Foreman Mike Griego testified his wife telephoned him at the plant about a month after the strike started and requested he pick up some groceries on his way home. He testified he encountered M. Salazar at the store, Salazar attempted to stop him as he was walking back to his auto from the store, addressed a curse at him as he kept going, pushed him, and asked him to get out of his auto after he entered it, saying he wanted to get even with Griego.

Salazar confirmed an encounter with Griego at the store, but testified the encounter took place after the strike ended and picketing ceased. Salazar testified prior to going on strike and while he was working as a bander, he made errors in writing up several tickets; Griego caught the errors when the products reached the shipping department and brought them to Salazar's attention; Salazar made up new and correct tickets and was about to replace the faulty tickets with the correct ones and destroy the faulty tickets when Griego suggested he take the correct tickets, replace the faulty tickets with the correct ones and destroy the faulty tickets. Salazar acceded, only to learn later Griego turned over the faulty tickets to Salazar's foreman, who used the faulty tickets as the basis for removing Salazar from the bander position and demoting him to a laborer position. Salazar stated the store encounter gave him an opportunity to upbraid Griego over his ratting on him with respect to the tickets; and that he invited Griego to get out of his car only after Griego ignored him and, after reaching his auto, locking the door, rolling down the window partway, stated Salazar and his fellow strikers were ''assholes'' for going on strike and losing their jobs and he was the better man because he was still working, at which point he invited Griego to leave his auto and he would introduce him to an ''asshole''; whereupon Griego exited the parking lot. Salazar denied he pushed Griego at any time.

Salazar impressed me as a much more forthright and reliable witness than Griego, whose testimony was hesitant and halting. I credit Salazar's testimony and find the encounter occurred in the manner and for the reason stated by Salazar.

Stone testified Griego in either June or July 1990 told him Salazar followed him out of a grocery store, tried to coerce him to fight and pushed him, but he refused to fight and went home. He testified ''the personnel department,'' not he, considered and decided not to reinstate M. Salazar when the March 1991 vacancy occurred in the binder position because of the Espinosa complaints and the Griego report. Stone further testified he did not have Griego prepare a written statement concerning the encounter until shortly before the hearing.

Griego's alleged oral reports to Stone were not utilized by Medite either to support its injunction action or unfair labor practice charges and M. Salazar's personnel file is devoid of any mention of the Espinosa complaints or the Griego report. Noone from Medite's personnel department supported Stone's claim he or she considered and decided not to reinstate M. Salazar in March 1991 because of the Espinosa complaints and the Griego report.

[14] Stone testified Miller maintained files on the strikers in his office and those files disappeared when Miller's employment was involuntarily terminated in July 1991.

J. *Analysis and Conclusions*

1. The 10(b) defense

Section 10(b) of the Act bars the Board from considering and deciding on their merits issues raised by unfair labor practice charges filed more than 6 months subsequent to conduct allegedly violative of the Act.

Medite contends the 12 Charging Parties' charges were filed more than 6 months after they had actual or constructive notice of vacancies in jobs they held prior to going on strike or jobs substantially equivalent to jobs they held prior to going on strike, contending because of such alleged notice, the 12 should be denied any relief under the Act.

P. Salazar's charge was filed on August 13, 1991, 11 days after Stone informed Salazar that Medite's July 30, 1991 notice to him of a job opening he might be considered for was cancelled on the basis of statements submitted to the Region in support of Medite's unfair labor practice charges against the Union stating Salazar engaged in alleged strike misconduct.

Mueller's charge was filed on January 14, 1992, approximately 4 months after he requested reinstatement following his September 3, 1991 receipt of information a job had opened which he might be considered for but had been filled by someone else.

Casias, Coca, L. Cordova, W. Cordova, Jones, Montano, M. Salazar, Sanchez, and Tafoya filed their charges on the same date Mueller filed his charge, i.e., on January 14, 1992.

Montoya filed his charge on January 27, 1992.

There is no evidence Casias, Coca, L. Cordova, W. Cordova, Jones, Montano, Montoya. M. Salazar, Sanchez, or Tafoya had clear and unequivocal actual or constructive notice Medite hired or transferred employees with less plant and job seniority than they to jobs they held prior to striking or jobs substantially equivalent to jobs they held prior to striking and it is clear both P. Salazar and Mueller filed their charges within 6 months after learning jobs they were qualified to perform were available.

To the contrary, the evidence discloses Medite barred ex-strikers from the plant area following the end of the strike; Stone informed Mueller employees who did not go on strike and the striker replacements were hostile towards the ex-strikers, both Salazars testified they were not communicating with the persons who replaced them or failed to join the strike and it is reasonable to conclude there was a similar lack of communication between the rest of the Charging Parties and the employees who replaced them or failed to join the strike.

These facts fall short of meeting Medite's burden of proof to show the 12 ex-strikers had actual or constructive clear and unequivocal notice that, subsequent to their requests for reinstatement following the end of the strike, Medite hired and/or transferred employees with less job and plant seniority to their former jobs or jobs substantially equivalent to jobs

they formerly performed.[15] In the absence of such proof, I reject Medite's contention the 12 Charging Parties are not entitled to such relief under the Act as may appear warranted on the basis of the evidence produced during the hearing concerning the merits of their charges.[16]

2. Alleged failures to offer to return to work

Medite denied in its answer to the complaint the 12 Charging Parties tendered unconditional offers to return to work following the end of the strike. In Medite's posthearing brief, however, Medite limits the contention to the position neither Coca nor Mueller tendered an unconditional offer to return to work following the end of the strike.

That contention is rejected.

Coca tendered an offer identical to offers tendered by Casias, L. Cordova, W. Cordova, M. Salazar, P. Salazar, and Tafoya on November 14, 1990, and on November 19, 1990, Miller sent identical letters to Casias, Coca, L. Cordova, W. Cordova, M. Salazar, P. Salazar, and Tafoya informing them a replacement had been hired in their jobs and no job was available for them. Coca's offer and Miller's response are in the record (G.C. Exhs. 17 and 17a).

On September 17, 1991, Mueller tendered an offer to return to work (G.C. Exh. 60).

On November 14, 1990, as noted above, Casias, L. Cordova, W. Cordova, M. Salazar, P. Salazar, and Tafoya tendered offers to return to work in language identical to the Coca offer the same date. In November 1990 Sanchez orally offered to return to work and Miller acknowledged receipt of the request with a reply stating Sanchez had been replaced and there was no job available for him. On December 4, 1990, Montano offered to return to work in language identical to the Casias et al. offers. On December 19, 1990, Montoya offered to return to work in language identical to the Casias et al. offers and Miller responded to the Montano and Montoya offers in the same manner he responded to the offers by Casias et al. All the offers were unconditional. I therefore reject Medite's contention any of the 12 failed to unconditionally offer to return to work following the end of the strike.

3. Alleged reinstatement offers

In its answer to the complaint, Medite denied it failed to offer reinstatement to the 12 Charging Parties. Neither the letter addressed to P. Salazar nor the letter addressed to Mueller by Medite constituted a reinstatement offer; at best, they were inquiries designed to learn if the two were available and interested in returning to work.

I therefore find and conclude Medite did not, as alleged in the complaint, offer reinstatement to any of the 12 Charging Parties subsequent to its receipt of their unconditional offers to return to work following the end of the strike.

4. Job vacancies Medite allegedly should have offered the Charging Parties following its receipt of their offers to return to work

a. *Feliverto Casias*

Casias was hired as an oiler in the maintenance department in March 1984 and was continuously employed in that position until he went on strike on June 11, 1990. On November 14, 1990, Casias tendered an unconditional offer to return to work to Medite.

It is undisputed at all material times Medite employed a single oiler in the maintenance department, that an employee was hired to replace Casias in that position during the strike, and that the replacement has continuously occupied that position since his hire.

Counsel for the General Counsel and Casias allege Casias completed a mechanical training course prior to going on strike, a position of mechanic IV was filled by bid on March 9, 1992, and contend that position was substantially equivalent to the oiler position and should have been offered to Casias. Alternatively, counsel for the General Counsel and for Casias allege since the bid procedures permitted employees to bid for any posted job vacancy, whether higher or lower paying,[17] Casias should have been offered the opportunity to bid on any jobs which were posted as vacant positions and which he believed he could perform and wished to bid for, citing *MCC Pacific Valves*, 244 NLRB 931 (1979).[18]

Counsel for Medite alleges its obligation to offer a job to an ex-striker only requires Medite to offer an ex-striker reinstatement to his former job or to a substantially equivalent job if such a job becomes available after Medite has received the ex-striker's unconditional offer to return to work. I find merit in Medite's position.

NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); *NLRB v. Great Dane Trailers*, 386 U.S. 26 (1967), and *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), established the doctrine that, following the end of a strike and an employer's receipt of an unconditional offer to return to work, inasmuch as the ex-striker retains employee status, he is entitled to nondiscriminatory treatment, i.e., the same opportunity as other employees to fill job vacancies which occur after the employer has received his offer to return to work.

The Board has subsequently ruled, however, an employer failure or refusal to reinstate the ex-striker to any job vacancy which occurs subsequent to the employer's receipt of the offer to return to work in a job the ex-striker is capable of performing does not constitute discriminatory treatment of the ex-striker; that the employer is only required to offer reinstatement to a vacancy in the job the ex-striker held prior to striking or a vacancy in a job which was substantially equivalent to that job, specifically rejecting the conclusion of Administrative Law Judge Robert Gritta that the employer in question was required to reinstate several ex-strikers to job vacancies in jobs the ex-strikers held and/or were capable of

[15] *Great Lakes Chemical Corp.*, 298 NLRB 615 (1990); *Crown Cork & Seal Co.*, 255 NLRB 14 (1981), enfd. 69l F.2d 506 (9th Cir. 1982).

[16] *Great Lakes Chemical Corp.*, supra; *Crown Cork & Seal Co.*, supra.

[17] Evidence established posted jobs had been awarded to a bidder who had a higher paying and higher skilled position at the time he successfully bid for a lower paying and lower skilled job.

[18] Noting plant seniority was accorded prime consideration in job awards to competing bidders and Casias' seniority dating from 1984.

performing prior to the job they were performing when they went on strike.[19]

With respect to the *MCC Pacific* case cited by counsel for the General Counsel and for Casias, their reliance on this case as authority for a proposition Casias should have been offered an opportunity to bid on any job he was qualified to perform is misplaced. In the *MCC Pacific* case, vacancies in jobs ex-strikers *held at the time they went on strike* were filled by replacements, following the employer's receipt of the ex-strikers' offers to return to work. The case does not stand for a principle ex-strikers are entitled to fill job vacancies in jobs *other than the jobs they held when they went on strike or substantially equivalent jobs* following the employer's receipt of unconditional offers to return to work.

Thus, while vacancies in unskilled or semiskilled jobs Casias was capable of performing (such as laborer, sticker etc.) occurred subsequent to Medite's receipt of Casias' offer to return to work, and while one might reason his long and satisfactory service for Medite should have entitled Coca to consideration for filling such vacancies had he been on layoff rather than on strike, the *Rose Printing* decision compels a contrary conclusion.

With respect to their former contention, I find and conclude the mechanic IV position was not substantially equivalent to an oiler position, since the mechanic IV position required the exercise of completely different skills than those of an oiler. The fact Casias took courses to qualify himself for such a position is irrelevant.

I therefore conclude counsel for the General Counsel and for Casias failed to establish any vacancy occurred in the Medite work force either in the job Casias held prior to the strike or any substantially equivalent job subsequent to Medite's receipt of Casias' offer to return to work.

b. *Benny Coca*

At the time Coca went on strike he was working as a class 3 millwright. He was continuously employed in that classification from February 1988. He previously worked as a storage operator (between October 1985 and February 1988). Coca tendered his unconditional offer to return to work to Medite on November 14, 1990. No vacancies in the millwright position have occurred since Medite's receipt of Coca's offer.

Counsel for the General Counsel and for Coca point out a storage operator position was awarded to a plant employee on June 6, 1991, and contend Coca should have been offered that job.

I reject that contention. As noted above, while one might reason Coca's long and satisfactory performance as a storage operator should have entitled him to greater consideration than the employee who was awarded the storage operator position on June 6, 1991, under *Rose Printing* Medite's obligation was limited to offering Coca reinstatement subsequent to its receipt of his offer to return to work only to a vacancy in the job Coca held when he went on strike or a substantially equivalent job. No vacancies have occurred in the millwright classification since Medite's receipt of Coca's offer and the storage operator job is not substantially equivalent to his millwright job.

I therefore find and conclude counsel for the General Counsel and for Coca failed to establish any vacancy has occurred in the job Coca held or in a substantially equivalent job since Medite received Coca's offer to return to work.

c. *Leroy Cordova*

From September 1984 to the date he went on strike, Leroy Cordova was employed at the plant as a millwright.

He tendered his unconditional offer to return to work to Medite on November 14, 1990.

No vacancies have occurred in the millwright classification since Medite's receipt of his offer.

I therefore find and conclude counsel for the General Counsel and for Cordova failed to establish any vacancy has occurred in the job Cordova held or in a substantially equivalent job since Medite received Cordova's offer to return to work.

d. *William Cordova*

Between March 1990 and the date he went on strike, William Cordova was employed at the plant as a shuffler operator. Between July 1989 and March 1990 he was employed as a bander; previously, as a laborer, forklift operator, and utility trainee. He was initially employed at the plant in September 1985.

William Cordova tendered his unconditional offer to return to work to Medite on November 14, 1990.

No vacancies have occurred in the shuffler operator position since Medite's receipt of Cordova's offer to return to work.[20]

Counsel for the General Counsel and for Cordova contend vacancies have arisen in the bander and forklift operator positions since Medite's receipt of Cordova's offer to return to work, that those positions are substantially equivalent to the shuffler operator position and should have been offered to Cordova.

At times material, the rate of pay for the shuffler operator position was $8.09; for bander, $7.73 and for forklift operator, $7.62. The former position required operation of a machine through computer controls; the latter two jobs did not, and involved completely different job functions. I therefore reject the contention the latter two jobs were substantially equivalent to the shuffler operator position.

On the basis of the foregoing, I find and conclude counsel for the General Counsel and for Cordova failed to establish any vacancy occurred in the job Cordova held prior to striking or in any job which was substantially equivalent to the job Cordova held prior to striking.

e. *Homer Jones*

In May 1990, a month before he went on strike, Jones was promoted to the position of sander operator; previously (since August 1989), he was a sander grader. Prior to that (between September 1988 and August 1989), he was also a sander operator (apparently demoted in an economic cutback). His previous jobs were bander, saw helper, environ-

[19] *Rose Printing Co.*, 304 NLRB 132 (1991).

[20] Unless, as noted above, an employee with less seniority was automatically progressed to that position since Medite's receipt of his offer to return to work.

mental (outside laborer), saw helper and temporary saw helper. His original date of hire was in March 1988.

Jones tendered his offer to return to work to Medite on December 3, 1990.

No vacancies have occurred in the sander operator position since Medite's receipt of Jones' offer to return to work.[21]

Counsel for Jones contends a sander grader position, which was filled on April 14, 1992, should have been offered to Jones.

I reject that contention; the sander grader position is not substantially equivalent to the sander operator position, but is an inspector position, i.e., the inspection of the panels after the sander operator has completed the sanding operation.

I therefore find and conclude counsel for the General Counsel and for Jones failed to establish any vacancy has occurred in the classification of sander operator or a substantially equivalent position since Jones tendered his offer to return to work.

f. *Pete Montano*

Between May 22, 1990, and the date he went on strike, Montano was employed as a cutoff saw helper. From the date he was hired, September 1, 1989 to May 22, 1990, he was employed in the environmental classification (outside laborer).

Montano tendered his unconditional offer to return to work to Medite on December 4, 1990.

Richard Martinez was hired as a laborer during the strike; promoted to the position of cutoff saw helper on November 13, 1990; subsequently demoted to the position of laborer; and again promoted to the position of cutoff saw helper on September 20, 1991.

Montano was not offered the September 20, 1991 vacancy.

Stone testified Medite was currently operating with only one saw crew rather than the four crews it maintained earlier and currently only required one saw helper. That situation fails to address the question of whether vacancies in the saw helper position occurred following Medite's receipt of Montano's unconditional offer to return to work to which Montano should have been recalled for such period as the employee awarded that position occupied the position and whether his seniority entitled his retention in that position in any further reductions in the number of saw helpers.

I therefore find and conclude Medite failed to offer Montano a vacancy which occurred in the position he held when he went on strike, subsequent to Medite's receipt of Montano's unconditional offer to return to work, filling it instead with a person hired as a laborer during the strike.

g. *George Montoya*

George Montoya was hired as a millwright on March 13, 1984, and worked in that classification until he went on strike.

Montoya tendered an unconditional offer to return to work to Medite on December 19, 1990.

There have not been any vacancies in the millwright classification since Montoya tendered his offer.

I find and conclude counsel for the General Counsel and for Montoya failed to establish any vacancies have occurred in the position Nontoya held since Montoya tendered his offer.

h. *Karl Mueller*

Mueller was hired as a laborer in March 1990 and remained in that position until he went on strike.

On September 17, 1991, Mueller tendered an unconditional offer to return to work to Medite.

On November 8, 1991; December 9, 1991; February 25, 1992; March 27, 1992; and April 15, 1992, Medite hired six laborers as new hires. Mueller was not offered any of those jobs.

I find and conclude the foregoing establishes Medite failed to offer to reinstate Mueller to six vacancies in the position Mueller held prior to the strike, following its receipt of his unconditional offer to return to work, filling the vacancies in question with six new hires.

i. *Manuel Sanchez*

At the time he went on strike, Sanchez was a millwright. He became a millwright in May 1990, after previous service as a millwright leadman. Between November 1989 and February 1990, when he became a leadman, he was a millwright 3. Prior to that, he was a laborer, a utility employee, a forklift operator, a truckdriver, and an environmental employee (outside laborer). His initial date of hire was in July 1984.

Sanchez orally tendered an unconditional offer to return to work in November 1990 and was advised (in writing, by Miller) he had been replaced and no job was available in the millwright classification.

No vacancies have occurred in the millwright classification since Medite received Sanchez' offer to return to work.

Counsel for the General Counsel and for Sanchez maintain there have been vacancies in the utility, forklift operator and truckdriver positions since Medite's receipt of Sanchez' offer to return to work which should have been offered to Sanchez.

None of those positions, however, are substantially equivalent to the millwright position Sanchez held at the time he went on strike.

I therefore find and conclude counsel for the General Counsel and for Sanchez failed to establish a vacancy in the position Sanchez held at the time he went on strike or in a substantially equivalent position occurred subsequent to Medite's receipt of Sanchez' unconditional offer to return to work.

j. *Max Salazar*

Max Salazar was hired as a laborer in September 1985; he was subsequently promoted to a bander position; demoted to a laborer position and again promoted to a bander position, the position he held at the time he went on strike.

Salazar tendered an unconditional offer to return to work to Medite on November 14, 1990.

On March 16, 1991; June 25, 1991; August 29, 1991; and November 5, 1991, four persons hired as laborers during the strike were promoted to the position of bander.

Salazar was not offered any of the bander vacancies filled by the four on the dates just noted.

[21] Unless, as noted above, an employee with less seniority had been automatically progressed to that position since Medite's receipt of Jones' offer to return to work.

I therefore find and conclude Medite failed to offer to reinstate Salazar to four vacancies in the position he held prior to going on strike following his unconditional offer to return to work, but filled those vacancies with four persons hired as laborers during the strike.

k. *Perry Salazar*

Perry Salazar was hired as a laborer on October 9, 1987. He subsequently progressed to positions as refiner helper, saw operator and lastly utility employee, the position he held from December 1989 to the date he went on strike.

Salazar tendered an unconditional offer to return to work to Medite on November 14, 1990.

Four persons hired as laborers during the strike were promoted to the position of utility employee on December 11, 1990; July 31, 1991; August 16, 1991; and December 18, 1991.

I therefore find and conclude Medite failed to place Salazar in a December 11, 1990 vacancy in the position he held prior to going on strike, despite its earlier receipt of his unconditional offer to return to work, employee status and both job and plant seniority as well as satisfactory performance in that position, filling the vacancy instead with a junior employee with no prior experience in the position.

l. *Arturo Tafoya*

Medite hired Arturo Tafoya as a laborer on May 1, 1984. On August 14, 1984, he was promoted to the position of saw forklift operator and remained in that position until he went on strike.

On November 14, 1990, he tendered an unconditional offer to return to work to Medite.

On June 6, 1991, and on April 1, 1992, two employees hired as laborers during the strike were promoted to the position of sander forklift operator. Ex-striker/employee Paul Garcia, the Charging Party in Case 16–CA–1128l1–5, which was settled during the hearing, received an inquiry from Medite with respect to his availability to fill the latter vacancy (his last position prior to going to strike was as a sander forklift operator) and responded affirmatively, but the vacancy was nevertheless awarded to a laborer hired during the strike with less plant seniority and no job seniority in the vacant position.

The forklift used by a saw forklift operator is smaller and its operator handles smaller panels than the forklift operated by the sander forklift operator. I nevertheless find and conclude the controls and operation of the two forklifts is substantially equivalent and note the sander forklift operator services the in-line saw as well as the sander (Stone so testified).

I therefore find and conclude subsequent to Medite's receipt of Tafoya's unconditional offer to return to work, Medite failed to place Tafoya in two vacancies in a substantially equivalent position to the position he held when he went on strike despite his employee status and superior seniority and work experience status over the two junior employees awarded the two vacancies.

5. Alleged violations of the Act

I have entered findings and conclusions that, following its receipt of unconditional offers to return to work from Montano, Mueller, M. Salazar, P. Salazar, and Tafoya after the strike ended, Medite filled subsequent job vacancies with new hires or transferees hired during the strike and failed to recall Montano, Mueller, M. Salazar, P. Salazar, and Tafoya to those job vacancies, despite the fact they retained employee status, were senior to the persons placed in those jobs, and the jobs in question either were jobs they held at the time they went on strike or substantially equivalent thereto.

I therefore conclude Medite violated Section 8(a)(1) and (3) of the Act by failing to reinstate Montano and Mueller to vacancies they normally, in view of their employee status, seniority and qualifications therefor, would and should have been placed in, rather than the junior employees placed therein.[22]

With respect to M. Salazar, P. Salazar, and Tafoya, the question of whether Medite failed or refused to recall the three to fill vacancies in their last or a substantially equivalent position because of an honest belief they engaged in serious misconduct during the strike shall be determined below.

I have entered findings and conclusions. Counsel for the General Counsel and for the Charging Parties failed to establish vacancies in the positions Casias, Coca, L. Cordova, W. Cordova, Jones, Montoya, and Sanchez held at the time they went on strike or in substantially equivalent positions occurred following Medite's receipt of their unconditional offers to return to work.

I therefore conclude Medite did not violate the Act by failing or refusing to recall Casias, Coca, L. Cordova, W. Cordova, Jones, Montoya, and Sanchez, following its receipt of their unconditional offers to return to work.

6. The alleged disqualification of M. Salazar, P. Salazar, and Tafoya for reinstatement

Medite alleges it did not recall M. Salazar and P. Salazar to fill vacancies in the positions they last held (or a substantially equivalent position, in Tafoya's case) because at the time the vacancies occurred, it held an honest belief the three engaged in serious misconduct during the strike and therefore it did not violate the Act by failing or refusing to recall the three to fill those positions.

Medite also contends W. Cordova tendered a written resignation to it, contending it therefore did not violate the Act by failing or refusing to reinstate him.

In addition, Medite contends it did not violate the Act vis-a-vis Coca and Mueller on the ground Coca and Mueller did not file unconditional offers to return to work to Medite following the end of the strike and that it did not violate the Act with respect to unnamed charging parties because they secured equivalent employment and abandoned reinstatement.

I have entered findings Coca and Mueller tendered to Medite unconditional offers to return to work following the end of the strike and therefore reject that defense.

Medite neither established by valid evidence any of the Charging Parties secured equivalent employment and abandoned reinstatement nor advanced argument supporting that contention. That defense is likewise rejected.

---

[22] *NLRB v. Fleetwood Trailer Co.*, supra; *NLRB v. Great Dane Trailers*, supra; *Laidlaw Corp.*, supra; *Rose Printing Co.*, supra; also see *Oregon Steel Mills*, 291 NLRB 185 (1988), and *MCC Pacific Valves*, supra.

It is unnecessary to determine whether W. Cordova tendered a written resignation nor its effect, inasmuch as I have entered findings and conclusions Medite did not violate the Act by failing to place W. Cordova in any vacant position following its receipt of his unconditional offer to return to work, since no vacancies occurred in his last or a substantially equivalent position following Medite's receipt of his offer.

It is also unnecessary to determine whether Medite violated the Act by failing to place Coca and Montoya in vacancies which occurred after its receipt of their unconditional offers to return to work because Medite had an honest belief Coca and Montoya engaged in misconduct during the strike, inasmuch as I have entered findings and conclusions Medite did not violate the Act by failing to place Coca and Montoya in any vacant position, since no vacancies occurred in their last or a substantially equivalent position following Medite's receipt of their offers.

The remaining question is whether Medite did not recall M. Salazar and P. Salazar to fill vacancies in the last positions they held prior to striking when vacancies occurred in those positions following Medite's receipt of their offers to return to work because at the time those vacancies occurred it had an honest belief the two Salazars engaged in serious misconduct during the strike. A similar question is whether Medite did not recall Tafoya to fill a vacancy in a position which was substantially equivalent to the last position he held prior to striking because at the time that vacancy arose it held a similar belief.

In 1984 the Board adopted the rule an employer does not violate the Act by refraining from recalling an ex-striker/employee to fill a vacancy in a position he held when he went on strike or a position substantially equivalent thereto when the employer honestly believes at the time the vacancy occurred that employee engaged in serious misconduct during the strike which reasonably tended to coerce or intimidate other employees' exercise of their rights under Section 7 of the Act, including their right to refrain from supporting the strikers during the strike.[23]

Only after the employer establishes he refrained from such recall at the time such a vacancy occurred (and following its receipt of the ex-striker/employer's unconditional offer to return to work) because of such belief is it incumbent upon counsel for the General Counsel and counsel for the ex-striker/employee's to prove the ex-striker/employee was nevertheless entitled to fill the vacancy because the ex-striker/employee did not engage in the believed misconduct.

Whether Medite did not violate the Act by refraining from recalling M. Salazar, P. Salazar, and Tafoya when vacancies in the positions they held when they went on strike (or a substantially equivalent position, in Tafoya's case) after Medite's receipt of their unconditional offers to return to work because Medite honestly believed the three engaged in such misconduct shall be determined below.

a. *M. Salazar*

Max Salazar was a bander when he went on strike, in June 1990. He tendered an unconditional offer to return to work to Medite on November 14, 1990.

The Miller response to his offer made no mention of any rejection of his offer based on any believed strike misconduct.

The Espinosa complaints over Salazar's use of ''bad words'' in addressing her while she crossed the picket line during the strike and his alleged confrontation with foreman Griego during the strike were neither reduced to writing nor utilized in seeking and securing a court injunction during the strike nor to support Medite's unfair labor practice charges against the Union.

Vacancies in the bander position occurred on March 15, June 25, August 29 and November 11, 1991. M. Salazar was not placed in any of those vacancies.

Stone testified ''the personnel department,'' not he personally, decided not to reinstate M. Salazar to the March 25, 1991 vacancy because of the Espinosa complaints and the Griego incident. M. Salazar's personnel file, however, contained no reference to either the complaints or the Griego incident and Noone from the personnel department testified he or she decided not to reinstate M. Salazar to the March 25, 1991 vacancy because of an ''honest belief'' Salazar engaged in those activities during the strike.

On the basis of the foregoing, I conclude Medite failed to establish it refrained from recalling M. Salazar, an employee with greater plant seniority, job seniority, and demonstrated ability to perform the duties of the vacant position, to fill the March 25, 1991 vacancy in the binder position because of an honest belief Salazar engaged in serious misconduct during the strike.

I further conclude, in any event, the Espinosa complaints and the Griego encounter do not support a conclusion Medite did not violate the Act by failing to recall M. Salazar to the first vacancy in the binder position which occurred following Medite's receipt of his unconditional offer to return to work.

Profanity was common among the work force,[24] I credit M. Salazar's testimony he did not push Griego, the Griego/Salazar encounter did not take place in or around the picket line, it did not interfere with or coerce Griego's exercise of any Section 7 right, it was not an attempt to prevent Griego from working at the plant, and M. Salazar was reasonably provoked by Griego's derogatory remarks when he invited Griego to step out of his vehicle and meet an ''asshole.''

Under *Clear Pine Moulding*, only conduct which reasonably tends to coerce or intimidate employee exercise of rights protected by the Act warrants denying reinstatement to an ex-striker.

Salazar's conduct vis-a-vis Espinosa and Griego fails to meet that test. Crude and obscene remarks to a female employee by a striker while the employee crossed the picket line, unaccompanied by any physical threats, is insufficient basis for denying a striker reinstatement to his former job following the end of the strike[25] nor are exchanges between a striker and a supervisor away from the picket line prompted by a personal grievance and not involving any attempt to coerce the supervisor into supporting the strike. They do not constitute serious misconduct warranting an employer denial of the striker's right, as an employee, to recall to fill a va-

[23] *Clear Pine Mouldings*, 268 NLRB 1044 (1984), affd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986).

[24] Stone so testified.

[25] *Georgia Kraft Co.*, 258 NLRB 908 (1981), affd. 696 F.2d 931 (11th Cir. 1983)

cancy in his former job, following the end of the strike and the ex-striker/employee's unconditional offer to return to work.

I therefore find and conclude Medite violated Section 8(a)(1) and (3) of the Act by failing to recall M. Salazar to fill the first vacancy in the position he held prior to striking which occurred after Medite's receipt of his unconditional offer to return to work, in view of his employee status, seniority and qualifications for the vacant position superior to the seniority status of the employee awarded the position and the fact that employee lacked any experience in the duties of the position in question.

b. *P. Salazar*

Perry Salazar was hired in 1987; between December 1989 and June 11, 1990, when he went on strike, he worked as a utility employee. The utility employee insures the continuity of production by relieving the form station operator, the press operator and the refiner operator, all machines which are computer controlled.

I have entered findings on June 13, 1990, Salazar struck foreman Ortiz' jeep with the picket sign he was carrying when Ortiz' jeep was halted by children blocking the driveway he was proceeding on prior to entering the highway and that Ortiz executed affidavits in June and July 1990 utilized in support of Medite's injunction petition and unfair labor practice charges against the Union.[26]

Salazar's unconditional offer to return to work was tendered to Medite on November 14, 1990.

The first vacancy in the position Salazar held when he went on strike subsequent to Medite's receipt of Salazar's offer occurred on December 11, 1990. It was awarded on December 19, 1990, to a laborer hired during the strike.

Stone claimed Medite refrained from recalling Salazar to fill the December 11, 1990 vacancy because of an honest belief Salazar engaged in the conduct set forth in the June and July 1990 Ortiz' statements.

There is no question at the time the vacancy occurred Salazar had superior plant and job seniority and had demonstrated a long and satisfactory ability to perform the duties of the job, while the junior employee awarded the job had no prior experience therein.

Stone's claim is insupportable. He did not become Medite's personnel director until February 1991, 2 months after the December 19, 1990 award, he did not (and could not) testify he refrained from recalling Salazar to fill the vacancy in December 1990 because of his honest belief Salazar engaged in the June 13, 1990 conduct vis-a-vis Ortiz and Medite failed to adduce any other proof some other manager refrained from recalling Salazar to fill the December 11, 1990 vacancy because of such belief.

I thus conclude Medite violated Section 8(a)(1) and (3) of the Act by failing to fill the December 11, 1990 vacancy in the utility employee position with Salazar, in view of his employee status, seniority, and previous longtime service in that position and by filling it instead with a junior employee with no previous experience in the duties of the position.

[26] The Salazar/Ortiz encounter subsequent to Ortiz' leaving the picketing area was not mentioned in either affidavit.

c. *Arturo Tafoya*

Arturo Tafoya, originally hired as a laborer in May 1984, worked as a saw forklift operator from August 14, 1984, through the date he went on strike, June 11, 1990.

I have entered findings on June 13, 1990, Tafoya struck Ortiz' vehicle with his picket sign while Ortiz' vehicle was stopped at the picket line that day.

I have also entered findings Tafoya was in the area during the fracas which occurred on June 20, 1990, after Mascarenas left his vehicle and engaged in a fracas with Coca et al., but that Tafoya did not engage in the fracas and did not strike Mascarenas, but rather told the strikers to disengage.

Lastly, I have entered findings Tafoya was not in the vehicle with Coca and Montoya when an exchange of words between Coca and Mark Dominguez occurred on July 11, 1990.

Ortiz identified Tafoya as one of the pickets who struck his vehicle with a picket sign on June 13, 1990, in the June and July 1990 affidavits utilized by Medite in supporting its injunction petition and unfair labor practice charges against the Union.

Mascarenas also submitted affidavits in June and July 1990 in support of Medite's injunction petition and unfair labor practice charges. In one affidavit (submitted to the Region), Mascarenas stated he did not see Tafoya hit him, Foreman Alexander and Plant Manager Miller told him a film taken by a guard at the gate showed Tafoya hitting him. In the second affidavit (submitted in support of the injunction petition), Mascarenas stated Tafoya ''tried to'' hit him. Alexander also submitted an affidavit in support of the injunction petition stating Tafoya ''joined in the fray, trying to punch Joe.'' In their testimony before me, however, both Mascarenas and Alexander testified Tafoya did not join in the fracas nor does the film taken by the guard show Tafoya hitting Mascarenas nor did the guard identify Tafoya as one of Mascarenas' attackers (the guard initially testified he saw Tafoya hit Mascarenas, but under cross-examination admitted he could not see what punches landed on Mascarenas from his station at the guard shack across the railroad tracks in front on the plant).

While Dominguez gave a sworn statement to an agent of the Region on July 11, 1991 wherein he described an ax display incident involving Montoya at the picket line, he made no mention therein of his alleged exchange with Coca while Coca was in Montoya's auto and Tafoya allegedly was in the Montoya auto.

Miller did not mention any strike misconduct as a ground for denying Tafoya consideration in filling subsequent vacancies, following Miller's receipt of Tafoya's unconditional offer to return to work in November 1990.

Vacancies occurred in the sander forklift operator position on April 1 and June 6, 1991.

Stone testified generally Medite refrained from placing Coca, Montoya, M. Salazar, P. Salazar, and Tafoya in vacancies which occurred in positions they held at the time they went on strike (or substantially equivalent positions) in an honest belief the five engaged in misconduct during the strike, including the Tafoya conduct set forth in the Ortiz, Mascarenas and Alexander affidavits.

I have found Medite failed to establish Medite refrained from placing the two Salazars in such vacancies on the basis of such an ''alleged belief.''

I reach a similar conclusion with respect to Tafoya.

The first vacancy in a forklift operator position following Medite's receipt of Tafoya's offer to return to work occurred on April 1, 1991, and was awarded to a laborer hired during the strike and subsequently awarded the position of storage operator. Neither Garcia, an ex-striker/employee who filed an offer to return to work prior to the vacancy, nor Tafoya, was given any consideration for filling the vacancy.

Since Medite refrained from recalling Garcia, a senior, qualified ex-striker/employee even better qualified than Tafoya to fill the vacant position (since Garcia held that position at the time he went on strike), choosing instead to fill the position with a junior striker replacement with no experience in the job, I conclude Medite never considered Tafoya for recall to fill the vacant job, much less deciding to refrain from recalling Tafoya to fill the vacant position because of an ''honest belief'' he engaged in serious misconduct during the strike.

I therefore find and conclude Medite violated Section 8(a)(1) and (3) of the Act by refraining from recalling Tafoya to fill the vacancy in the sander forklift operator position which occurred on April 1, 1991, but instead placed a junior employee with less experience in the operation of a forklift therein. Alternatively, since the facts discussed above support a finding and conclusion ex-striker/employee Garcia should have been recalled to fill the April 1, 1991 vacancy, I reach a similar finding and conclusion on the same grounds with respect to the June 6, 1991 vacancy.

d. *Medite's real motive*

The Miller edict following the end of the strike, the failure to develop a preferential recall list of ex-strikers/employees who remained on strike until the bitter end and offered to return to work following its end, plus the the Medite conduct detailed above, support my conclusion that, following the end of the strike, Medite adopted the policy of refraining from placing senior, qualified employees who remained on strike until its bitter end and offered to return to work following the end of the strike, to fill vacancies in positions they held when they went on strike or substantially equivalent positions and awarded those vacancies to employees who replaced the strikers, because those senior, qualified employees who sought recall engaged in the strike, thereby discriminating against those employees for exercising their Section 7 right to support the Union in violation of the Act.

CONCLUSIONS OF LAW

l. At all pertinent times Medite was an employer engaged in commerce in a business affecting commerce and the union was a labor organization within the meaning of Section 2 of the Act.

2. Since February 1991 James D. Stone has been Medite's personnel director, a supervisor and agent of Medite acting on its behalf within the meaning of Section 2 of the Act.

3. Following its receipt of unconditional offers to return to work following the end of a strike called by the Union on June 11, 1990, by refraining from filling vacancies which occurred in positions Pete Montano, Karl Mueller, Max Salazar, and Perry Salazar held at the time they went on strike or, with respect to Arturo Tafoya, in a position substantially equivalent to the position Tafoya held at the time he went on strike, because Montano et al., engaged in the strike, Medite violated Section 8(a)(1) and (3) of the Act.

4. Inasmuch as vacancies in the positions Casias, Coca, L. Cordova, W. Cordova, Jones, Montoya, and Sanchez held at the time they went on strike or substantially equivalent positions have not occurred since Casias et al. tendered unconditional offers to return to work following the end of the strike, Medite has not violated the Act by failing to recall Casias et al.

5. The aforesaid unfair labor practices affected and affect interstate commerce as defined in Section 2 of the Act.

THE REMEDY

Having found Medite engaged in unfair labor practices, I recommend Medite be directed to cease and desist therefrom and to take affirmative action necessary to effectuate the policies of the Act.

Having found Medite violated the Act by refraining from recalling employees Pete Montano, Karl Mueller, Max Salazar, Perry Salazar, and Arturo Tafoya following the end of a strike which commenced on June 11, 1990, and Medite's receipt of their unconditional offers to return to work to fill vacancies in the positions they occupied at the time they went on strike or, in Tafoya's case, to a vacancy in a position substantially equivalent to the position he occupied at the time he went on strike, I recommend Medite be ordered to immediately recall Montano et al. to those or substantially equivalent positions, with full seniority and all other rights and privileges, and to make Montano et al. whole for the discrimination practiced against them by payment to each of the sum of money equal to what each would have earned from the date each should have been recalled until the date each is recalled, less interim earnings during the period, computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest on the sum due to each computed in accordance with the formulae of *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Florida Steel Corp.*, 231 NLRB 651 (1967).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, Medite of New Mexico, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to recall employees who have participated in a strike, following their unconditional offers to return to work, to positions they occupied at the time they went on strike or to substantially equivalent positions as and when a vacancy occurs.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

---

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Offer immediate recall to Pete Montano, Karl Mueller, Max Salazar, Perry Salazar, and Arturo Tafoya to the positions they held on June 10, 1990, or substantially equivalent positions, with full restoration of their seniority and other rights and privileges, and make them whole in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records, reports, and all other records necessary to analyze and determine the sums due under the terms of this Order.

(c) Post at its facility in Las Vegas, New Mexico, copies of the attached notice marked ''Appendix.''[28] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure the notices are not altered, defaced, or covered by other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''